Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	

OPPOSITION OF SUNESYS, LLC TO PETITION FOR RECONSIDERATION FILED BY CONSUMER ENERGY, ET AL

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SUMMARY

More than five years after numerous parties, including Sunesys, first requested that the Commission modify its pole attachment rules to address serious concerns, in April 2011, the Commission issued a thorough, well-analyzed, critically important order that will greatly enhance broadband deployment (the "Order"). The Commission's Order, rendered after reviewing an exhaustive record, was a great example of a careful balancing of interests, with an eye towards ensuring that the public would significantly benefit from the Order. Moreover, all of the parties to this proceeding had more than ample opportunities to express their views in countless comments, ex parte filings and otherwise.

Nevertheless, Consumer Energy and a few other utilities (collectively, "Petitioners") have filed a Petition for Reconsideration with respect to the Order. Therein, Petitioners rehash their same arguments, which were thoroughly vetted by the Commission over the past several years, and rejected in the Order. There is no reason for the Commission to change its correct rulings now. Petitioners' already-rejected proposals would seriously undermine the benefits that flow from the Order.

For example, Petitioners seek to drastically reduce the number of poles that would apply to the timeline, which would, among other things, greatly undermine the benefits of the Order, ensure that broadband deployment moves at a far slower pace (under Petitioners' proposal many projects would take more than a year simply to get pole attachment approvals), and also jeopardize many BTOP projects' ability to meet statutory deadlines. Petitioners ignore that states such as New York and Connecticut do not even have caps on the number of poles for which their timelines apply, and that the Commission here took a more moderate approach, and could have easily taken a more aggressive approach with no caps on the number of poles.

Petitioners also seek to impose a litany of other exceptions to the deadline, which would render the rules far more murky, and far less valuable, to say the least. In addition, despite the fact that related proceedings have been ongoing for years, and Petitioners have known for more than a year (since the release of the National Broadband Plan and the release of the Further Notice in this proceeding) that a deadline similar to the one in the Order would likely be imposed, Petitioners have asked to have the full implementation of the Order delayed for another year. After more than five years since these issues were first raised with the Commission, there is simply no reason to delay the benefits of this Order another day, let alone another year.

Finally, Petitioners seek a number of other modifications to the Order that are equally ill-advised, as explained further in this Opposition.

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Sunesys, LLC ("Sunesys") hereby submits this opposition (this "Opposition") to the Petition for Reconsideration filed by Consumer Energy, et al. (collectively "Petitioners").

INTRODUCTION

On April 7, 2011, the Commission issued a thorough, well-analyzed, critically important order with respect to pole attachment matters that have been significantly undermining broadband deployment for far too many years (the "Order").[1] To say that the issues resolved in the Order were carefully considered and analyzed by the Commission in light of the full record would be the ultimate understatement. The issues decided in the Order had been in front of the Commission for anywhere from four to nearly five and a half years, depending on the issue, during which time the Commission received countless comments and *ex parte* filings from a multitude of parties on all sides of the matter.

[1] *Report and Order and Order on Reconsideration*, FCC 11-50; Implementation of Section 224 of the Act (WC Docket No. 07-245); A National Broadband Plan for Our Future (GN Docket No. 09-51), April 7, 2011. The Order was published in the Federal Register on May 9, 2011, 76 Fed. Reg. 26620.

In fact, the Commission likely could have rendered its decision on numerous issues in this proceeding, including the access issues, nearly a year earlier but instead released a Further Notice of Proposed Rulemaking to absolutely ensure it had given all parties a chance to weigh in -- once again -- on all of the issues. After receiving another round of extensive comments and reply comments on all of the issues, followed by a plethora of ex parte filings, the Commission rendered an Order that could be a model for all federal agencies: one that looked at the matter from numerous angles, over many years, taking into consideration the views of countless parties, and then reached conclusions that sought to balance the needs of the parties involved, but most importantly ensured that the needs of the public are met.

In light of the analysis conducted by the Commission, it is hardly surprising that only two Petitions for Reconsideration were filed, one of which is the Petition for Reconsideration filed by Petitioners that is the subject of this Opposition submitted by Sunesys.

In this filing, Sunesys references a few of the many important points that establish that the Commission should deny Petitioners' Petition for Reconsideration on the access issues and other issues addressed in this Opposition. Sunesys, however, does not intend to repeat all of the countless facts in the record and analysis in the Order that led to the same inescapable conclusion reached by the Commission a couple of months ago; nor is such repetition necessary given the Commission's thorough and complete analysis which resulted in the Order.

DISCUSSION

I. The Importance of the Order with Respect to Access Issues Cannot be Understated

There is no question that the Commission had the authority to issue the Order. As it found,

> Congress recognized … that there is a "local monopoly in ownership or control of poles," observing that, as found by a Commission staff report,

> "'public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents . . . in the form of unreasonably high pole attachment rates.'" Given the benefits of pole attachments to minimize "unnecessary and costly duplication of plant for all pole users," Congress granted the Commission authority to ensure that pole attachments are provided on just and reasonable rates, terms, and conditions.[2]

Moreover, the Commission also aptly referenced and/or described the importance of, the support in the record for, and some of the benefits that will flow from, the Order with respect to the access issues addressed therein in numerous places throughout the Order, including the following passages:

> In its efforts to identify barriers to affordable telecommunications and broadband services, the Commission has recognized that lack of reliable, timely, and affordable access to physical infrastructure—particularly utility poles—is often a significant barrier to deploying wireline and wireless services. There are several reasons for this. First, the process and timeline for negotiating access to poles varies across the various utility companies that own this key infrastructure. The absence of fixed timelines and the potential for delay creates uncertainty that deters investment. Second, if a pole owner does not comply with applicable requirements, the party requesting access may have limited remedies; because of time constraints, cost, or the need to maintain a working relationship with the pole owner, it may not wish to pursue the enforcement process.
>
> .....
>
> The record in this proceeding demonstrates that the current framework often results in negotiation processes that may be so prolonged, unpredictable, and costly that they impose unreasonable costs on attachers and may create inefficiencies by deterring market entry.... Obtaining access to poles and other infrastructure is critical to deployment of telecommunications and broadband services. Therefore, to the extent that access to poles is more burdensome or expensive than necessary, it creates a significant obstacle to making service available and affordable.

[2] Order at par. 4.

.....

> We find that adopting a specific timeline for processing pole attachment requests will give necessary guidance to both pole owners and attachers. Evidence in the record reflects that, in the absence of a timeline, pole attachments may be subject to excessive delays. Moreover, having a specific timeline offers certainty to attachers and allows them to make concrete business plans. Beyond generalized problems caused by utility lack of timeliness from initial request through completion, the record shows pervasive and widespread problems of delays in survey work, delays in make-ready performance, delays caused by a lack of coordination of existing attachers, and other issues. Adopting a specific timeline will also generate jobs and help to move large broadband projects forward more expeditiously, including those providing broadband to schools under the E-rate program.[3]

II. Specific Access Issues

A. The Commission Should Not Change the Number of Poles for which the Timeline Applies

In their Petition for Reconsideration, Petitioners seek to reduce the maximum number of poles subject to the timeline under the Order for large jobs by approximately 83%, and then have that reduced maximum apply to the total number of requests by all attachers, rather than requests for each attacher, so the actual reduction under Petitioner's proposal would even be far greater, and perhaps as much as 90% or 95% of the number set by the Order. Such a change to the Commission's well-analyzed Order would greatly undermine the benefits that would otherwise flow from the timeline and saddle broadband deployment with further delays. Petitioners raised their arguments on these points in the proceeding, and they were properly rejected by the Commission. There is absolutely no reason for the Commission to reconsider them now.

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[3] Id. at pars. 3, 6, 21.

Petitioners' Petition for Reconsideration seeks to leave the impression that all states that have imposed timelines have longer timelines with fewer poles subject to them. But that simply is not true. What Petitioners steadfastly ignore is the timelines that are used in states such as New York and Connecticut, where there are no limits to the number of poles for which the timelines apply, and where the deadlines are no longer than those imposed by the Commission here. And while Utah's timeline is different than the Commission's timeline, it applies to a similar number of poles. The Commission here struck a careful balance between the most aggressive, broadband-favorable states, and the less aggressive states. That balance was more than appropriate.[4]

Moreover, if the Commission adopted Petitioners' proposal here, many BTOP projects may not even come close to meeting the statutory deadlines, and numerous community anchor institutions and other entities requiring access would not receive the necessary broadband capabilities. For a number of the BTOP projects, providers will likely need to obtain 10,000 pole

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[4] As the Commission also stated,

> In light of the scaled approach to limiting the order size, and the timeline tolling provisions we adopt, we disagree with utilities that argue that the timeline imposes a rigid, "one-size-fits-all" solution that lacks the flexibility utilities need to accommodate pole attachment requests. Although we appreciate the complexity of some attachment requests, we find that several measures adequately address this concern. First, the timeline applies to orders that are within the scope of the timeline and subject to the volume cap set forth in this section. Second, the timeline does not begin to run until engineering protocols and technical standards have been established for the prospective attachments at issue. We leave utilities free to implement the timeline consistent with our rules. We leave the details of specific application criteria and processes to individual utilities, but the criteria must be reasonable. For example, some utilities have "detailed permit manuals which explain the application and attachment process," and at least one utility has a "web-based application platform, which provides an on-line, step-by-step, item-by-item description of the application and attachment process." We do not dictate utility implementation procedures. When we consider these factors together, we reject the contention that the timeline is inflexible.
>
> Order at par. 73.

attachments from a utility or more. Under Petitioner's proposal -- at best (if there were no other attachers in the state seeking attachments from the same utility) -- the provider would be forced to file its applications, 500 at a time, over a 20 month period. The statutory deadline for compliance with BTOP grants would be seriously jeopardized - and the reason would be pole attachment delays because the cap was too low. In fact, under Petitioner's proposal it could take 4 or 5 years to receive the attachments because other attachers would be seeking attachments as well (and Petitioners' proposal would place the cap at 500 a month for large jobs for all attachers collectively).

In addition, Petitioners' proposal would also undermine other important projects around the country as well. For example, when Sunesys builds-out to serve school districts, the number of pole attachments needed can easily reach 7,000. With a cap as low as 500 poles a month (and realistically even fewer a month, since Petitioners' proposed cap is for all attachers combined), that can mean it may take more than a year, and possibly more than two years, to submit all of the applications. But school districts generally will not wait a year or more to receive the broadband services they need, let alone two years or more, that such a lengthy application period as a result of a too-small cap will create. Nor should they. Moreover, it is common for facilities-based providers to perform 150 to 200 mile build-outs, which equate to approximately 7,000 poles or more. The Order encourages these critical broadband buildouts. Petitioners' proposal, conversely, would greatly discourage them.

Petitioners also ignore two other important points. First, for wireline providers such as Sunesys, the remedy if pole owners miss the deadline is not the filing of a complaint, but simply the right to seek to obtain utility-approved contractors to perform the work.[5] As the Commission stated,

> We concur with the Public Service Commission of New York that "it is reasonable to require the utilities either to have an adequate number of their own workers available to do the requested work, to hire outside contractors themselves to do the work, or to allow [a]ttachers to hire approved outside contractors." The transfer of control to the new attacher, including the ability to hire contractors, is key to the effectiveness of the timeline. First, the

[5] Order at pars. 19, 49 and 50.

> prospect of surrendering control of the pole to an attacher may spur a utility to complete a survey or make-ready that it might otherwise not timely perform. Second, if the pole owner lacks the resources or the will to perform make-ready, the prospective attacher may pursue the project through any lawful means, including use of additional resources. Finally, because the remedy takes effect automatically, the benefit is immediate, and does not depend on the time- and resource-consuming complaint process.
>
> As many attachers argue, time is of the essence for the success of their businesses. Utilities allege, however, that they face many impediments to accomplishing make-ready work. We find that permitting this self-help remedy should address both sets of concerns. Moreover, we find this to be a practical solution. The record shows that contractors already work for utilities to perform surveys and make-ready work in the communications space on a regular and professional basis, and presumably can perform the same activities for attachers. We are not persuaded by contentions that use of contractors is impractical or unduly burdensome. We agree that the statutory obligation to provide access to poles places some burden on pole owners. It is, however, a burden that Congress found appropriate to place on utilities in order to facilitate the critical delivery of video, telecommunications, and other communications services, including broadband, and one that the courts have upheld. We find no persuasive evidence in the record that the burdens on utilities of attachers' use of contractors are significant or that utilities are unable to work around the other impediments they claim. Moreover, our requirement that attachers use contractors that the utility has approved should substantially limit concerns about contractor qualifications.[6]

Thus, the Commission's carefully tailored remedy here minimizes the risk to utilities while maximizing the benefit to the public and broadband deployment.

Second, many poles do not need make-ready work. Therefore, the number of poles for which make-ready work is requested is likely to be far fewer than the number of poles for which the attachment is requested.

For all of the foregoing reasons, and countless more set forth in the record, the Commission should reject Petitioners' attempt to reduce the number of poles for which the timeline applies.

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[6] Id. at pars. 50-52.

B. The Commission Should Reject Petitioners' Efforts to Create Exceptions that Likely Would Largely Swallow the Rule

Petitioners seek to have the Commission alter its Order to create exceptions that likely would largely swallow the rule. Petitioners request, for example, that the timeline be tolled for seasonal storms. But not only do Petitioners have a number of months to comply with the deadlines, the Commission even gave Petitioners an extra 15 days on top of all of that – a "freebie" of sorts – to complete the process where they claim to need that extra time.[7] That 15 days, on top of the months they already have to comply, should enable Petitioners to weather common seasonal storms and still comply with the Order.[8]

Petitioners also assert that the timeline should be tolled where there are preexisting violations of other attachers on the pole. However, remedying the preexisting violations should not take long (and would be part of any proper make-ready work), and given the length of time pole owners have for attachments they should be able to complete this task. At a Commission event, one of the regulators for Connecticut stated that utilities asked for the same relief there, and Connecticut refused to give Petitioners any additional time. The 15 day "freebie" period here does even more for pole owners and is eminently reasonable.

Petitioners also request additional time for obtaining government permits and private easements. Given that the construction of new poles is not necessary under this Order, it would be extremely rare, at best, for Petitioners to need any new private easements extending in scope beyond those already existing that permitted installation of the existing pole line, or any government permits at all, let alone any that would take long to receive.

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[7] Order at pars. 29, 36, 39. Order at 39 ("A utility may also assert its 15-day right of control in order to add flexibility to the timeline…").

[8] The Commission noted that "Oncor states that the two longest power outages due to weather that its customers have suffered in recent memory lasted six and 10 days". Order at par. 69.

With respect to Petitioners' claim that they should have extra time if the new attacher proposes an inadequate route design, that is something utilities should flag early on and should not be a reason to restart the entire shot-clock from the beginning. Pole owners simply cannot wait months to inform attachers of problems with the applications.

Finally, Petitioners have requested that the Commission refrain from applying the timeline at all whenever certain types of pre-existing attachers have an attachment on the pole, such as a highway department. But such a proposal would greatly undermine the effectiveness and applicability of the timeline imposed in the Order. As the Commission correctly found,

> Similarly, we disagree with certain commenters ... that the presence of non-regulated attachment (such as a municipality's traffic light) on poles somehow places these poles outside of Commission authority. As previously stated, the Commission has the authority to regulate, by rule, the terms and conditions of pole attachments; a utility cannot escape the Commission's jurisdiction simply by attaching attachments that are outside the reach of the statute or by entering into a joint use contract. A joint use contract gives the parties to the contract some degree of control over the pole, and "control" is the statutory floor for Commission jurisdiction, regardless of whether a non-regulated attachment is also located on the pole.[9]

All in all, if the above exceptions sought by Petitioners were adopted, it might be great for private lawyers who could spend countless hours debating the length of the exception and whether it applied in that instance – but it would be terrible for the public who needs better and less expensive broadband access.

C. The Commission Should Reject Petitioners' Proposal to Further Delay Implementation of the Timeline

Petitioners also request a delay in the full implementation of the timeline for an additional year. The Commission should reject this request. The statutory deadlines in many BTOP grants may be missed if the deadlines under the Order are not in full effect for another year. The goal of the BTOP program is to promptly advance broadband deployment and

[9] Order at par. 94.

competition, and pole attachments are critical in this regard. Delaying the full effect of the Order for another year is counter to the BTOP program.

Delaying the effectiveness of the Order is also contrary to the needs of this country with respect to advancing broadband deployment. Simply put, broadband deployment should not be delayed any further by postponing the effectiveness of this rule. The issues of a timeline were first raised to the Commission in late 2005. Sunesys' first filing on these issues was in January 2006. Sunesys and other attachers, and more importantly the public who needs better and less expensive broadband access, have waited a long, long time for this ruling. Delaying its effectiveness for another year would be an unwise, anti-broadband, decision that would unduly postpone all of the benefits that will flow from the Order.

Finally, Petitioners have had advance notice that this outcome was likely. Even if Petitioners were not aware of the likelihood of this outcome years ago when a related proceeding commenced, they certainly should have been aware of it 15 months ago when the National Broadband Plan recommended an approach very similar to the timeline adopted in the Order. Moreover, the deadline adopted in the Order is extremely similar to that proposed by the Commission in its Further Notice in this proceeding, which Further Notice was released more than a year ago. In short, Petitioners have had more than ample time to prepare for this Order.

III. Other Issues

A. Petitioners' Request to have the Commission Impose the Oregon Rules for Safety Violations

Petitioners have requested that the Commission impose the Oregon rules for safety violations. Sunesys does not recall the safety violation portion of the Oregon rules as being part of this proceeding, and to the extent the issue was not raised below it should not be

addressed in the Petition for Reconsideration. If, however, the Commission takes this step it should ensure that utilities do not receive a double recovery for both unauthorized attachments and safety violations relating to the same attachments.

B. Boxing and Extension Arms

Petitioners request that (i) the Commission permit pole owners to discontinue or limit the use of boxing and extension arms going forward, regardless of past policy, on a non-discriminatory basis; and (ii) if one of two joint pole owners restricts boxing and extension arms, and the other does not, the more restrictive rule apply. As to the first issue, if the Commission grants Petitioners' request (and Sunesys does not believe it should), the Commission should certainly ensure that the non-discrimination requirement also apply to the utility itself. That is, the utility should not be able to ban third-party attachers from using boxing and extension arms going forward, but permit itself to continue to do so.

As to the second issue, if one of two joint pole owners permits boxing and extension arms on the poles, obviously it is not a safety issue, and thus that decision should be controlling as to both.

C. Notifying Existing Attachers of New Attachments

Petitioners request that the Commission mandate that all attachers participate in NJUNS, SPANs or some other electronic attachment notification system. Sunesys does not recall this issue as being part of this proceeding, and to the extent the issue was not raised below it should not be addressed in the Petition for Reconsideration. In any event, these systems are not prevalent in all states, and the costs to join can be high. Moreover, given the advent of advanced computer technology and existing data bases, pole owners should have up-to-date lists of existing attachers and their contact information so it should not be difficult to reach them

unless the utilities have failed to keep good records. Thus, the Commission should reject Petitioners' request here.

D. Excluding Pole Owners from Liability

Petitioners have requested that the Commission hold that pole owners cannot be held liable for damages, including consequential damages, resulting from mandatory rearrangements or relocations required by the new rules. At a minimum, pole owners should not be excused from liability where they cause personal injury or death, and pole owners should also not be excused from liability where they did not offer an existing attacher a reasonable opportunity to move its own attachment.

CONCLUSION

For all of the foregoing reasons, Sunesys respectfully requests that the Commission deny Petitioners' Petition for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 23, 2011, I served the following party via First Class Mail.

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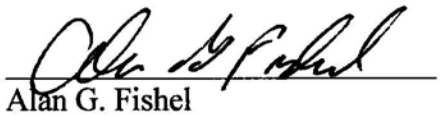

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